Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Text

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OPINIONS BELOW

The opinion and judgment of the court below giving rise to this petition are as follows:

State of Ohio v. Roberts, 55 Ohio St. 2d 191, 378 N.E. 2d 492, 9 Ohio Op. 3d 143 (1978)

Said opinion may be found at page 15 of the petition.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Supreme Court of Ohio herein was rendered July 19, 1978. No motion for a rehearing was filed.

This court has jurisdiction to review this matter upon certiorari pursuant to 28 U.S.C., Section 1257(3), in that the validity of Section 2945.49, Ohio Revised Code, has been drawn into question on the ground that it is repugnant to the Sixth Amendment to the Constitution of the United States.

Certiorari was granted herein on April 16, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Section 2945.49, Ohio Revised Code

Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

QUESTION PRESENTED FOR REVIEW

Where a witness, called by a criminal defendant at a preliminary hearing, testifies in a manner incriminating the defendant and was not cross-examined although there was opportunity to do so, and that witness is later shown

to be unavailable to testify at the trial of the same defendant on the same charge, does the confrontation clause of the Sixth Amendment to the Constitution of the United States preclude the State's use of the witness' recorded testimony?

STATEMENT OF THE CASE

The facts underlying this case which are germane to this appeal are as follows:

The defendant, Herschel Roberts, was arrested in the City of Mentor, Lake County, Ohio, on January 7, 1975, and charged with forgery. Later, additional charges of receiving and concealing stolen property and possession of heroin were brought.

Shortly after defendant's arrest, a preliminary hearing was held in which witnesses were called both by the State of Ohio and by the defendant. Anita Isaacs, one of the witnesses *called on behalf of the defendant,* testified in such a manner that incriminated the defendant. Counsel for defendant had, but did not exercise, an opportunity to declare her a hostile witness and cross-examine. At the conclusion of said preliminary hearing, the defendant was bound over to the Lake County Common Pleas Court.

After indictment and arraignment, numerous trial dates were set in Common Pleas Court. As a result of continuances all occasioned on the part of the defendant and his leaving the jurisdiction, however, trial was not held until March 4, 1976.

During defendant's March 4, 1976 trial, the State of Ohio offered as evidence, and the Court admitted over defendant's objections, a transcript of Anita Isaacs' preliminary hearing testimony, admissible pursuant to Section

2945.49 of the Ohio Revised Code, the witness Anita Isaacs being an unavailable witness pursuant to said Section.

Prior to the admission of the recorded preliminary hearing testimony of Anita Isaacs, her mother, Amy Isaacs, was questioned outside the hearing of the jury to determine the whereabouts of Anita, the last time Anita had been seen by her mother or father, and whether or not Amy Isaacs had had any communication with her daughter (App. 8-11). Amy Isaacs testified that she had not been in contact with or had word of her daughter for 13 months (App. 8) other than two telephone calls; one received from Anita in which Anita did not indicate her whereabouts but indicated she was not in the State of Ohio (App. 11), and another from a California social worker who indicated that Anita was trying to obtain welfare in California (App. 10). Mrs. Isaacs also testified that neither her husband nor any of her friends or relatives had been in any communication with Anita Isaacs, and that Anita's whereabouts were unknown (App. 9).

Counsel for defendant objected to the introduction of the recorded testimony at App. 12-13, *viz.*:

"The Court: Are you acquainted with the testimony about to be heard?

Mr. Plasco: Your Honor, for the record, I was furnished the day before trial with a copy of a transcript that allegedly took place at a preliminary hearing in the Mentor Municipal Court on January 10, 1975. I have a number of objections to the admissibility of said transcript into evidence, or being read to the jury in the present case at bar.

The Court: Proceed.

Mr. Plasco: Thank you, your Honor. To begin with, I'm objecting to the constitutionality of Ohio

Revised Code Section 2945.49. The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client. It is not to eliminate hearsay. Many times hearsay evidence is intentionally left in so the defense attorney can get more information. * * *"

Defendant's counsel continued his objections through App. 14, specifically stating therein:

"Mr. Plasco: I further object your Honor, * * *

* * * * *

For these reasons, we would strongly object to the admissibility of the transcript as being prejudicial to Mr. Roberts' rights in violation of the U.S. Constitution—confrontation of witnesses, allowing hearsay testimony into evidence. Thank you."

Although the trial judge did not specifically overrule defendant's objections, he did say, at App. 14:

"The Court: That's the danger that you take when you conduct a fishing expedition in a preliminary, instead of going by the new rules providing for discovery. Proceed, Mr. Perez?

Mr. Perez: Proceed with argument, or proceed with—

The Court: With your transcript."

The defendant was found guilty by the jury on counts of forgery, receiving stolen property, and possession of heroin, and subsequently appealed the convictions to the Lake County Court of Appeals on the question presented herein. The Court of Appeals reversed the judgment of

the trial court on the grounds that the admission of the preliminary hearing testimony violated the defendant's Sixth Amendment right to confrontation of witnesses, and because the State had failed to make a showing of sufficient effort to locate the missing witness.

After allowing a motion filed by the State of Ohio to certify the record, the Ohio Supreme Court affirmed the judgment of the Court of Appeals. The Ohio Supreme Court held, as a matter of state law, that the language of the statute, "whenever the witness . . . cannot for any reason be produced," is satisfied by a showing that the witness has disappeared; that her whereabouts were entirely unknown.

But by a 4-3 majority, the Ohio Supreme Court affirmed the reversal of the conviction, holding that notwithstanding several U. S. Supreme Court decisions *contra*, the confrontation clause of the Sixth Amendment was offended in this situation because the witness was not *actually* cross-examined.

It is from the judgment of the Ohio Supreme Court that the State of Ohio sought a writ of certiorari. This Court granted certiorari on April 16, 1979.

SUMMARY OF ARGUMENT

I

The use of prior recorded testimony of a witness unavailable at trial is not repugnant to the confrontation clause of the Sixth Amendment when certain indicia of reliability are present. During the last hundred years this court has established that recorded testimony bears such indicia when taken at a judicial hearing when the accused

has the *opportunity* to cross-examine the witness. The unavailability of the witness must not be due to an act or omission of the prosecution and the state bears a burden of making a "good faith effort" to locate the witness and produce him at trial. The judicial hearing at which the testimony is recorded must be "full-fledged," with counsel available to the accused, sworn and recorded testimony, and an opportunity to cross-examine.

This court has stated that the mission of the Confrontation Clause is to assure the accuracy of the trial process and give the trier of fact a basis for evaluating the truth of the recorded testimony. Further, this court has stated that a state court was wrong in ruling that an opportunity to cross-examine at a preliminary hearing failed to provide the indicia of reliability required to satisfy the confrontation clause.

II

During his preliminary hearing, defendant, through his counsel, called a witness to testify on his behalf. To defendant's surprise, this witness refuted many of defendant's contentions, and incriminated him. The trial on this matter did not commence for fourteen months and by that time the witness could not be found. Pursuant to an Ohio statute, the trial court allowed the use of the transcript of the preliminary hearing testimony as evidence. Defendant was subsequently convicted.

The Court of Appeals reversed the decision on the grounds that a "good faith effort" to locate the witness was lacking. The Ohio Supreme Court affirmed the appellate decision but on different grounds. It did not find lack of a "good faith effort" but instead held that absent *actual* cross-examination, recorded preliminary hearing testimony would not be admissible at trial.

The Ohio high court was highly selective in the authority it cited in support of its conclusions. It made much of the *dicta* in one case and chose to ignore extensive other *dictum* recognizing indicia of reliability present in the testimony at issue. The dissent in the 4-3 decision accurately stated the applicable law and characterized the majority opinion as "highly subjective." The *opportunity* to cross-examine, the dissent accurately concluded, is the key to whether the demands of the confrontation clause are met, not whether actual cross-examination took place.

III

It is uncontroverted that the prosecution had no knowledge of the whereabouts of the missing witness. Any method for compelling attendance of a witness presupposes some knowledge of the witness' whereabouts. In the instant case, the witness' mother testified that neither she nor any member of the immediate family knew where the witness was living. The state did all in its power to secure attendance by issuing subpoenas to the last known residence. With absolutely no knowledge concerning the location of the witness, any further act by the state would have been in vain. The burden of making a good faith effort to produce a witness was met by the state and this witness clearly qualified as unavailable. Such unavailability establishes the necessary predicate for the introduction of prior recorded testimony.

IV

The opportunity afforded to the defendant to confront the witness at the preliminary hearing was sufficient to satisfy the confrontation clause of the Sixth Amendment.

As stated by this Court, the second prerequisite for introduction of a prior statement is the presence of indicia of reliability whether the statement—either in its content or in the manner of its taking—which affords the trier of fact a basis for evaluating truth.

This Court has outlined some of the indicia which would permit the use of testimony recorded at a preliminary hearing to later be used at trial. The circumstances of the preliminary hearing must closely approximate those at trial. The witness must be under oath. The accused must be represented by counsel and have an opportunity to cross-examine. The proceedings must be properly recorded.

All of these indicia were present in the case at bar and the requisite degree of reliability was assured.

A preliminary hearing in Ohio involves all the characteristics of a typical trial and can accurately be characterized as a "full-fledged" judicial hearing. Included is a full right of and opportunity for cross-examination. Such an opportunity afforded the defendant his right of confrontation.

Finally, it must be noted that the question of whether there actually was cross-examination at the preliminary hearing is open to dispute. Upon realizing the adverse nature of the witness' testimony, defense counsel began to use tactics, such as leading and argumentative questions, which are the hallmark of cross-examination. These tactics continued without objection by either the court or opposing counsel. The totality of circumstances under which testimony was taken at the preliminary hearing—including *de facto* cross-examination—afforded the jury at trial a satisfactory basis for evaluating the truth of the testimony, and thus the testimony was not erroneously admitted at trial.

ARGUMENT

I. The Case Law

The question presented here is one which this Court has recognized but never specifically decided in the several cases in which use of prior recorded testimony in a criminal trial has been discussed in light of the confrontation clause of the Sixth Amendment.

One hundred years ago in *Reynolds v. United States*,[1] this Court held that if a witness was wrongfully kept away from trial by a criminal defendant, that witness' testimony taken at a former trial of the defendant for the same offense may be used without offending the confrontation clause.

Sixteen years later, *Mattox v. United States*,[2] this Court considered the case of a murderer convicted not just once, but twice after the first conviction was reversed on appeal.

Between the first and second trials two witnesses had died, and the reporter's notes of the testimony of the two witnesses at the first trial were introduced at the second trial. In the second round of appeals, Mattox claimed such use of the prior recorded testimony violated his confrontation clause rights, a claim rejected by this Court, which commented:[3]

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.
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> * * * * *
>
> The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven.

1. 98 U.S. 145 (1879).
2. 156 U.S. 237 (1895).
3. At 156 U.S. 242-244.

In 1900, in *Motes v. United States*[4], this Court first considered whether testimony taken and recorded at a *preliminary examination* could be used at the later trial of the same case when the witness became unavailable.

This Court noted, with approval, the words of a contemporary scholar:[5]

> In his Treatise on Constitutional Limitations, Cooley, after observing that the testimony for the People in criminal cases can only, as a general rule, be given by witnesses in court, at the trial, says: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an *opportunity* then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party."

The Court noted, however, that the absence of the witness was due to the gross negligence of the government, and therefore "the case is not within any of the recognized exceptions to the general rule prescribed in the constitution."[6]

Four years after *Motes*, this Court completed the turn-of-the-century round of confrontation clause cases with *West v. Louisiana*.[7]

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4. 178 U.S. 458 (1900).
5. At 178 U.S. 472.
6. At 178 U.S. 474.
7. 194 U.S. 258 (1904).

West was not a confrontation clause case, but rather a due process case. This Court specifically declined to address the issue of compliance with the confrontation clause when preliminary examination testimony was used at a state criminal trial when the witness had permanently absented himself from the state.[8]

Nevertheless, *West* is both instructive and pertinent to the inquiry here.

The Court rejected West's due process claim,[9] commenting:

> The accused has, as held by the state court in such case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the state cannot procure the attendance of the witness at the trial, and he is a nonresident and is permanently beyond the jurisdiction of the state, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.

Important in the analysis of the question was whether the common law permitted use of prior testimony merely because of the nonresidence or permanent absence of the witness. While this court concluded that nonresidence or permanent absence was not one of the reasons allowing use

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8. The Court noted, at 194 U.S. 264:

> "As the 6th Amendment does not apply to state courts, the question as to what is required under its provisions in order to reserve the right to be confronted with the witness is eliminated from any inquiry by the court in this case."

Not until *Pointer v. Texas*, 380 U.S. 400 (1965), discussed *infra*, did this court hold the confrontation clause applicable to the States via the Fourteenth Amendment.

9. *Id.*

of prior recorded testimony at common law,[10] it found no impediment in the due process clause to the state making a change in its own law to accommodate such use.[11]

A number of years passed before this Court directly dealt with the issue again. But *Pointer v. Texas*[12] provided the starting point for the last 19 years' litigation on the issue.

Bob Granville Pointer had been convicted of robbery after a trial in which the prior-recorded testimony taken at a preliminary hearing was offered against him. The witness whose testimony was introduced via the transcript had moved out of Texas and had no intention of returning.

This Court held, first, that the confrontation clause of the Sixth Amendment was applicable to the states,[13] overruling that portion of its holding in *West*.

But more importantly to the inquiry here, this Court held that Pointer was denied his right to confront the witness at the preliminary hearing because he was unrepresented by counsel and was not afforded the opportunity to cross-examine.

"As has been pointed out," this Court observed, "a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an *opportunity* to cross-examine the witnesses against him."[14] (Emphasis added)

The analysis in *Pointer* then focused on *Mattox*,[15] where the transcribed testimony from a former trial, where

10. At 194 U.S. 262.
11. At 197 U.S. 263.
12. 380 U.S. 400 (1965).
13. At 380 U.S. 406.
14. At 380 U.S. 406, 407.
15. 156 U.S. 237.

the *opportunity* to confront existed, was constitutionally admissible at later trial. But at Pointer's preliminary hearing such opportunity to cross-examine did not exist. The lack of such opportunity was crucial, as this Court observed in conclusion:[16]

> The case before us would be quite a different one had (the witness') statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. Compare Motes v. United States, supra, 178 U.S., at 474, 44 L. Ed. at 1156. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses. The case before us, however, does not present any situation like those mentioned above or others analogous to them. Because the transcript of (the witness') statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross examine (the witness), its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed.

The facts in *Barber v. Page*[17] were similar to those in *Pointer* in that the prior recorded testimony of an "un-

16. At 380 U.S. 407, 408.
17. 390 U.S. 719 (1968).

available" preliminary hearing witness was introduced at Barber's trial. The facts differ in that (a) Barber's attorney had every opportunity to, but did not, cross-examine the missing witness at the preliminary hearing, and (b) the "unavailable" witness was in a known location (a federal prison) but 225 miles from the situs of the trial, and was, with minimal effort, actually "available" to the prosecution through legal process.[18]

This latter difference was crucial in this Court's analysis of the case. The utter lack of any effort whatever to secure the witness' presence at trial, when his whereabouts were known, justified the holding that Barber was denied his right of confrontation. This Court observed:[19]

> In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why the witness was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

The Court then asked, but left unanswered, a question it must decide herein: whether opportunity to confront at a preliminary hearing is, constitutionally, equivalent to opportunity to confront at trial. It was observed:[20]

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18. See note 4 at 390 U.S. 724, discussing the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, and the common law *writ of habeas corpus ad testificandum*. Neither of these remedies were available to petitioner herein at respondent's trial, as the whereabouts of missing witness Anita Isaacs were entirely unknown.

19. At 390 U.S. 724-725.

20. At 390 U.S. 725-726.

Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined (the witness) at the preliminary hearing. (Citing *Motes*.) The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

If the language, above, stood alone, it is unlikely that any prosecutor—including petitioner herein—would attempt to assert that confrontation at a preliminary hearing could be equivalent to confrontation at trial.

Yet the antagonism to the proposition so evident in the language from *Barber*, quoted above, was as evidently missing from the opinion in *California v. Green*,[21] where this Court said, as a prelude to the opinion:

> The California Supreme Court construed the Confrontation Clause of the Sixth Amendment to require the exclusion of (the witness') prior testimony offered in evidence to prove the State's case against Green because, in the court's view, neither the right to cross-examine (the witness) at the trial concerning his current and prior testimony, *nor the opportunity to*

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21. 399 U.S. 149 (1970).

cross-examine Porter at the preliminary hearing satisfied the commands of the Confrontation Clause. We think the California court was wrong on *both* counts. (Emphasis added)

Green posed the precise question of whether the confrontation clause is offended by use of recorded preliminary hearing testimony to impeach different testimony by a prosecution witness at trial. It was clear that the presence of the witness at trial met the commands of the confrontation clause, and this Court so held,[22] but it went further, commenting:[23]

> "We also think that (the witness') preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For (the witness') statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. (The witness) was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had *every opportunity* to cross-examine (the witness) as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, (the witness') statement would, we think, have been admissible at trial even in (the witness') absence if (the witness) had been actually unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result

22. At 399 U.S. 164.

23. At 399 U.S. 165.

> should follow where the witness is actually produced." (Emphasis added)

Thus, a conflict in *dictum*: antagonism to the use of recorded preliminary hearing testimony in *Barber*, and acceptance two years later in *Green*. This conflict is one which this Court must resolve herein.

The Court, however, will not be without some guidance from its past decisions.

In *Green*,[24] this Court spoke of the "indicia of reliability" which are the basis for the various exceptions to the hearsay rule and which also form the basis for exceptions to the literal right of confrontation.[25]

Such indicia were noted in the early cases. In *Reynolds*,[26] such indicia were found in the fact that testimony was taken at another trial on the same charge, but under a different indictment, at which the defendant was present and had full opportunity to cross-examine.

In *Mattox*,[27] the indicia of reliability in a statement given under oath were compared with those in a dying declaration:[28]

> A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused,

24. At 399 U.S. 161-162.

25. *Green* also decided, at 399 U.S. 155-156, that the confrontation clause was *not* mere codification of common law heresay rules, but that it was independent of such rules. Thus, evidence admissible as an exception to hearsay rules may violate the confrontation clause, and evidence which is constitutionally permissible under the confrontation clause may be inadmissible as heresay.

26. *Supra*, note 1.

27. *Supra*, note 2.

28. At 156 U.S. 243-244.

and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error, 146 U.S. 140, 152 (36: 917, 921), the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight under oath, there is equal if not greater reason for admitting testimony of his statements which were made under oath.

In *Motes*, where, as in *Barber*, the crucial issue was not the reliability of the evidence but rather the negligence of the goverment, the appropriate indicia were found, again in testimony given at a prior judicial hearing, under oath, and subject to cross-examination by defendant's counsel.

And in *West*,[29] the question was whether due process permitted mere absence from the jurisdiction to justify

29. *Supra*, note 7.

the use of prior recorded testimony. This Court resolved that issue in favor of the state, but noted[30] the familiar indicia: a prior judicial hearing, the defendant present, and an opportunity to cross-examine by counsel.

Thus, by the time of the modern cases, "indicia of reliability" had become the touchstone of the test of admissibility of evidence which conformed to the confrontation clause. Further, certain familiar factors—the circumstances of a judicial hearing—had become ingrained in the common law as such indicia.

Then came *Dutton v. Evans*,[31] in which the testimony offered had not been taken at a judicial tribunal with the aforementioned indicia of reliability.

Evans had been convicted of murder after a trial in which eyewitnesses described in detail the execution-style killings of three police officers. But the testimony also included a statement, related by a former federal prisoner, that while in prison one of Evans' co-conspirators implicated Evans in the murders. Evans, in a habeas corpus proceeding, alleged a violation of the confrontation clause.

Certainly, the statement made in prison was not made in a judicial setting and thus did not fit the familiar indicia. Yet the plurality of this Court[32] found no violation of the confrontation clause because the statement bore *other* indicia of reliability related to content and circumstances.

Thus, *Evans* teaches that the familiar judicial-setting indicia of reliability are not the *only* indicia which may provide a basis for an exception to literal enforcement of the confrontation clause. *Other* indicia—provided they show the basic purpose of the clause will be met—will

30. At 194 U.S. 264.

31. 400 U.S. 74 (1970).

32. At 400 U.S. 89.

allow relaxation of its strict commands in the interests of justice.

As the plurality noted:[33]

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.'

Finally came *Mancusi v. Stubbs*,[34] the last of the confrontation cases to be discussed herein. Stubbs was convicted of a felony in a New York state court, which used an earlier Tennessee murder and kidnapping conviction as a predicate for sentencing him to an enhanced prison term as a second offender. The Tennessee conviction was the result of a second trial (an earlier conviction having been vacated via habeas corpus on the ground of inadequate assistance of counsel).

By the time of the second trial, one of the victims of the kidnapping, a crucial prosecution witness, had become a permanent resident of Sweden. The transcript of that witness' testimony at the first trial was introduced at the second trial, setting the stage for a second habeas corpus proceeding on the issue of confrontation.

The second habeas corpus action reached this court, which held the opportunity of cross-examination afforded at the first trial provided sufficient indicia of reliability to allow the trier of fact in the second trial a satisfactory basis for evaluating the truth of the prior statement. This court also held that the Tennessee Court could have, and

33. *Id.*, quoting *Green*, 399 U.S. at 161.

34. 408 U.S. 204 (1972).

did find the witness was unavailable. Thus, the use of the transcript at the second Tennessee trial did not offend the confrontation clause, and the murder-kidnap conviction formed a valid basis for the more severe sentence imposed by the New York Court.

After reviewing *Barber*, *Green*, and *Evans*, this court summarized:[35]

> It is clear from these statements, and from numerous prior decisions of this court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability' referred to in Dutton.

The focus then turned to whether such indicia could be found in the transcript taken at the first trial. This court found such indicia:[36]

> Since there was an adequate opportunity to cross-examine (the witness) at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of (the witness') testimony at the first trial bore sufficient "indicia of reliability" and afforded "The trier of fact a satisfactory basis for evaluating the truth of the prior statement." (Citing *Dutton*)

It was the case law discussed above which was available to the Ohio Supreme Court when it reached the decision appealed from herein. In summary:

In *Reynolds*,[37] a transcript of testimony taken at a trial was held admissible at a second trial where the witness was kept away by the defendant.

35. At 408 U.S. 213.

36. At 408 U.S. 216.

37. *Supra*, note 1.

In *Mattox,*[38] a transcript of testimony taken at a trial was held admissible at a second trial where the witness had died.

In *Motes,*[39] the court noted the general acceptance of transcripts taken at a preliminary hearing where the witness was unavailable, but held that because the unavailability of the witness was entirely the fault of the government, that the use of the transcript offended the confrontation clause.

In *West,*[40] a due process case, this court held a transcript of preliminary hearing testimony could be used at a state criminal trial when a witness had permanently absented himself from the state and was beyond reach of its process.

More than half a century later, in *Pointer,*[41] this court extended the protection of the confrontation clause to state criminal defendants, then considered whether a transcript of preliminary hearing testimony could be used at trial when the witness had moved out of the state. Because Pointer had no opportunity to confront or cross-examine the witness at the preliminary hearing, it was held, no right of confrontation was afforded and Pointer was thus denied the Sixth Amendment right.

In *Barber,*[42] the absolute failure of the prosecution to attempt to secure the presence of witness known to be incarcerated only 225 miles from the trial site was the basis for holding that Barber had been denied his right of con-

38. *Supra,* note 2.

39. *Supra,* note 4.

40. *Supra,* note 7.

41. *Supra,* note 12.

42. *Supra,* note 17.

frontation. But, in *dictum,* the court commented[43] in a manner antagonistic to the concept that opportunity to cross examine at a preliminary hearing will satisfy the confrontation clause where the witness is unavailable at trial.

Such antagonism was not evident in *Green,*[44] where preliminary hearing testimony was held to be properly used in extensively impeaching a prosecution witness who had "forgotten" crucial details of a drug deal at trial. Green also categorized the judicial nature of the preliminary hearing as "indicia of reliability" which permitted use of the prior recorded testimony.

In *Evans,*[45] the plurality held a statement made in a non-judicial setting may be used at trial without violating the confrontation clause provided it bears some indicia of reliability based on other than the traditional "judicial setting" factors.

And in *Stubbs,*[46] indicia of reliability were found where testimony taken at a trial—a judicial setting—was introduced at a second trial after the witness had moved out of the country.

II. The Case Below

A brief restatement of the facts may be helpful here.[47] Herschel Roberts was arrested by the Mentor, Ohio Police Department on January 7, 1975, and charged with forging

43. *Supra,* note 20.

44. *Supra,* note 21.

45. *Supra,* note 31.

46. *Supra,* note 34.

47. A more extensive recitation of the facts summarized here may be found in the opinion of the Supreme Court of Ohio, in the Petition, at 15-18.

a check in the name of Bernard Isaacs, and with receiving other property, namely, a number of credit cards belonging to Mr. Isaacs and his wife, Amy.

On January 10, 1975, Roberts was brought before the Mentor Municipal Court for a preliminary hearing. Anita Isaacs, daughter of the victims, was called *by the defendant* to testify in his behalf. She surprised counsel by refuting Roberts' contentions that she, Anita, had been living with Roberts and had given him the check and credit cards at issue.

After the hearing, the Municipal Court found probable cause to believe a crime had been committed and that Roberts was guilty, and bound him over to the Lake County Grand Jury. In due course he was indicted, but because of extensive delays caused by Roberts, trial did not commence until March 4, 1976.

By that time, Anita could not be found. Her mother testified,[48] in a hearing outside the presence of the jury, that Anita's whereabouts were entirely unknown, that Anita was probably outside the state of Ohio, and that there was no way to contact Anita, even in an emergency. Pursuant to a state statute[49] specifically permitting the use of preliminary hearing testimony when the witness becomes unavailable, the trial court admitted into evidence

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48. App. 8-11.

49. Section 2945.49, Ohio Revised Code, reads:

"Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or transcript, otherwise by other testimony."

the transcript of the preliminary hearing testimony of Anita Isaacs.

Roberts was subsequently convicted of the charges against him,[50] and appealed.

The Court of Appeals for Lake County, Ohio reversed the conviction, finding the state failed to make a showing of sufficient effort to locate Anita Isaacs to constitute the "good faith effort" required by *Barber v. Page*,[51] and that therefore Roberts was denied the right of confrontation guaranteed by the Sixth Amendment.[52]

After allowing a motion for leave to appeal, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals, but on different grounds.

Roberts, the Ohio Supreme Court ruled in its 4-3 decision, was denied his confrontation right not because the state failed to show a good faith effort,[53] but rather because absent *actual* cross-examination, recorded preliminary hearing testimony may not be introduced at trial.[54]

The court reached the result by overemphasizing the differences between a preliminary hearing and a trial in Ohio,[55] by ignoring the extensive examination of Anita Isaacs by defense counsel at the preliminary hearing,[56]

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50. Roberts was convicted of forgery, receiving stolen property (the credit cards), second count of receiving stolen property (silver items belonging to Mr. and Mrs. Isaacs) and possession of heroin (a small amount of which was found in his wallet).

51. 390 U.S. 719 (1968).

52. The opinion of the Court of Appeals is reproduced in the Appendix, at 1-7.

53. The showing of unavailability will be discussed in greater detail in Section III, *infra*.

54. See Petition, at 21-22.

55. This matter will be extensively explored in Section IV, *infra*.

56. *Id.*

and by selectively choosing which *dictum* in prior decisions of this Court it would recognize as holding.

The Ohio Supreme Court admits[57] "the basic factual issues—*e.g.* whether the defendant had stolen (sic)[58] the credit cards—were the same(,)" at the preliminary hearing as at trial. Yet it made much of the concern this court expressed in *dictum* in *Barber*[59] regarding the "much less searching exploration into the merits of a case" common to preliminary hearings, while wholly ignoring the later *dictum* in *Green*[60] which referred to the taking of testimony in a traditional judicial setting as indicia of reliability. Eventually, the Ohio Supreme Court decided that *Barber* "requires" the rule it fashioned,[61] not because the prosecution's actions failed to meet the "good faith" effort test announced in *Barber*, not because a preliminary hearing is a different kind of judicial hearing, but rather because *Barber* also held a lack of cross-examination at a preliminary hearing does not constitute a waiver of that right at trial![62]

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57. Petition, at 21.

58. No allegation was ever made that Herschel Roberts had stolen any of the items belonging to Bernard Isaacs, and Roberts was not charged with the burglary. Any supposition that Roberts was, in fact, the burglar, would be mere conjecture. How Roberts acquired the items in question is a mystery; yet it must be emphasized that the state is not required to prove the circumstances of receipt of the items to sustain a conviction.

59. At 390 U.S. 725-726, quoted *supra* at 17.

60. At 399 U.S. 165, quoted *supra* at 18-19.

61. Petition, at 22.

62. Reliance on this language from *Barber* is perhaps the most confusing part of the opinion, as the issue of waiver had neither been briefed nor argued before that court. Indeed, the State of Ohio has never contended, and does not now contend, that Roberts waived any Sixth Amendment right. What is contended, simply, is that under the facts, the commands of the Sixth Amendment were satisfied.

The Ohio Supreme Court then proceeded to consider *Green*, distinguishing its *dictum* away on the facts. While the court could have distinguished *Green* because the witness was available at trial, it chose instead to characterize the preliminary hearing in *Green* as "atypical in that the witness' story * * * was subject to extensive cross-examination. . . ."[63]

In his dissent, Justice, and now Chief Justice Celebrezze was obviously puzzled by the approach taken by the majority, commenting:[64] "This rather incongruous result is reached by indulgence in conjecture relative to the trial tactics of defense counsel, and is supported only by the highly subjective opinion that '* * * The mere opportunity to cross-examine at a preliminary hearing can not be said to afford confrontation for purposes of the trial.'"

The dissent summarized the *dictum* of *Barber, Green,* and *Pointer* ignored or distinguished by the majority, then proceeded to conclude with a focus on the majority's emphasis of trial tactics as a reason for its holding. The dissent concluded:[65] "(t)he extent of cross-examination whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

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63. See Petition, at 24. As we shall see in Section IV, *infra*, the examination of witness Anita Isaacs by defendant's counsel was not only extensive, unimpeded, and thorough, but at times included leading and argumentative questions which are the hallmark of cross-examination. Thus, the assertion by the Ohio Supreme Court, Petition at 24, that "The witness (Anita Isaacs) was never cross-examined," may be correct as a matter of technicality, but is surely incorrect as a matter of fact.

64. See Petition, at 25.

65. See Petition at 26, quoting *United States v. Allen,* 409 F.2d 611, 613 (10th Cir., 1969).

Thus, the stage was set for this court to grant certiorari and review the "highly subjective" opinion of a bare majority of the Ohio Supreme Court.[66]

III. The Unavailable Witness

It is firmly established and beyond question at this juncture that a necessary predicate to the introduction of any prior recorded testimony at a criminal trial is the unavailability of the witness. Since *Barber v. Page*,[67] it can also not be doubted that the mere absence of the witness from the jurisdiction will not suffice to establish that predicate; that the state must show both that the witness was actually unavailable and that it made a "good faith" effort to locate the witness and bring such a witness before a court.

And while the issues of whether Anita Isaacs was, in fact, unavailable, and whether the state made a good-faith

66. On June 13, 1979, the Ohio Supreme Court relied on its decision in the case herein in *State v. Ricardo Smith*, to be reported at 58 Ohio St. 2d 344. In *Smith*, the Ohio Court held, in a *Per Curiam* opinion: "Thus, the *Roberts* rule includes preclusion of an unavailable witness' testimony at the preliminary hearing where the record shows that the witness was cross-examined only briefly and ineffectively."

As in *Roberts*, *Smith* produced a sharp split in the Ohio Supreme Court, with the opinion agreed to by only a bare 4-3 majority, the dissenters citing the dissent in *Roberts*. Of special import is nature of the split on the Court. Former Chief Justice O'Neil, author of the *Roberts* opinion, died in October, 1978, and was replaced by Justice Celebrezze. Justice Holmes was elected to the bench at the November, 1978 election.

In *Smith*, Justice Holmes joined the dissent. Justice Locher, who had dissented in *Roberts*, did not sit in *Smith*, but was replaced, temporarily, by Judge McCormac of the state's Tenth Appellate District. Judge McCormac joined the majority in *Smith*.

Thus, it appears that with the addition of Justice Holmes to the bench, a majority of the Ohio Supreme Court has stated opposition to the *Roberts* rule, and that the future of *Roberts* as viable law in Ohio is in serious doubt even absent action by this Court.

67. 390 U.S. 719 (1966).

effort to secure her presence are not the basic issues herein, they do warrant limited discussion.

The Court of Appeals for Lake County was unsatisfied wth the explanation in the record as to Anita Isaacs' absence and devoted most of its opinion[68] to a discussion of whether the state made a showing of "clear-cut unavailability."[69]

The Ohio Supreme Court held the Court of Appeals was in error on that point:[70]

> In the instant cause the (defendant) argues that the state failed to show a good-faith effort to produce the witness in person, as required by the rule in *Barber*. But in *Barber*, the government knew where the absent witness was. In the instant cause, the reason for the witness' unavailability was not that she was at some known location beyond the court's power of subpoena, but that her whereabouts were entirely unknown; and it is recognized that a witness who has disappeared from observation is unavailable for purposes of the confrontation clause. Wigmore, *supra*, 215, Section 1405, and cases therein cited. As a matter of state law, R.C. 2945.49, authorizing the use of prior recorded testimony 'whenever the witness * * * cannot for any reason be produced,' is broad enough to cover instances where the witness has disappeared.
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> * * * * *
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> . . . we hold that in the present cause, the trial judge could reasonably have concluded from Mrs.

68. App. 1-7.

69. App. at 4.

70. See Petition, at 19, 20.

Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs.

* * * * *

Therefore, the trial judge could properly hold that the witness was unavailable to testify in person.

This conclusion as a matter of state law is also correct as a matter of federal constitutional law.

As this court noted in *Barber*, if the state desires the testimony of a witness who is incarcerated, and *has knowledge of the whereabouts* of that person, it may seek writs of *habeas corpus ad testificandum* or *habeas corpus ad prosequendum* to produce that witness.[71]

For witnesses not in prison, this Court noted, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings[72] provides a means by which prosecuting authorities from one state can obtain an order from a court in the state where the witness *is found* directing the witness to appear in court in the first state to testify. The state seeking the witness' appearance must pay the witness a specified sum as a travel allowance and compensation for his time.[73]

Yet one particular fact must be known about an out-of-state witness before he can be summoned through the Uniform Act: *the location of said witness.* As the Ohio Supreme Court commented in a case where a convicted

71. 390 U.S. at 724.

72. The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings has been adopted in Ohio and forms Sections 2939.25, *et seq.* of the Ohio Revised Code. Pursuant to its terms, adoption of the Act in Ohio allows prosecutors or defendants to ask other states to compel the attendance at trials in this state of witnesses *known* to be in other states which have adopted the Act.

73. 390 U.S. at 723, note 4.

criminal sought a writ of habeas corpus on the grounds that he was denied compulsory process:[74]

> Inasmuch as a state's process cannot extend beyond its borders, and thus, the state can not as a matter of right compel the attendance of a witness beyond its borders but can only procure such witnesses by the voluntary co-operation of another state, clearly the accused must be able to designate the witness *and his location with exactitude* before any duty devolves on the court to initiate the complex judicial process necessary under these acts to procure the attendance of out-of-state witnesses. (Emphasis added)

Surely the State of Ohio could bear no lesser burden than a criminal defendant. If a defendant must designate the location of a desired witness *with exactitude* before invoking the Uniform Act, so also must the state. Thus, when the location of a witness is unknown, the Uniform Act provides no tool to secure that witness' presence.

The facts herein are uncontroverted that the state had *no knowledge* of the whereabouts of the Anita Isaacs, and further that even her immediate family had no such knowledge.

The very persons who would most likely know where the witness was—her parents—had no knowledge of her whereabouts. How, then, was the State of Ohio to locate her and produce her at trial?

It cannot be disputed that the State of Ohio did all in its power to secure the presence of Anita Isaacs at trial by issuing subpoenas to her last known residence in the state. Other tools to secure the witness' presence were not used because without knowledge of her whereabouts,

74. *Lancaster v. Green*, 175 Ohio St. 203 at 205, 192 N.E.2d 776 (1963).

such tools would have been useless. And the law does not mandate the doing of a vain act.

The test mandated by this Court in *Barber* and *Green* was thus met by the State of Ohio in this case.

Any other standard would require that the State maintain constant surveillance of a State's witness before trial, or be barred from using prior recorded testimony. Any other standard would require the State to mount cross-country manhunts for witnesses who had exercised their right to travel to distant portions of this country with little more than a farewell.

The Ohio Supreme Court therefore did not decide the issue of actual unavailability in conflict with the federal standard established in *Barber*. The predicate for use of prior recorded testimony was established, and the only question remaining is thus one of whether the recorded testimony introduced in Roberts' trial bore sufficient indicia of reliability to meet the commands of the Sixth Amendment.

IV. The Prior-Recorded Testimony

We now turn to the central issue in this case: whether Herschel Roberts was denied his Sixth Amendment confrontation rights at trial by use of Anita Isaacs' recorded preliminary hearing testimony.

A. The opportunity afforded to cross-examine Anita Isaacs at the preliminary hearing satisfied the commands of the confrontation clause.

In the early cases, reviewed in Section I, *supra*, it became well established that recorded testimony taken at a prior judicial-type hearing would be admissible at a

federal criminal trial provided (a) The defendant was present at the time the testimony was taken, (b) that he was afforded the *opportunity* to cross-examine and (c) the "unavailability" predicate was established.[75] Until *Green*, these factors stood alone as perhaps the only factors which would permit an exception to the strict observance of the confrontation clause.

But in *Green*, followed later in *Dutton* and *Stubbs*, this court established that the judicial-setting factors are only some of many possible "indicia of reliability" which "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[76]

It is submitted here that the *opportunity* afforded Roberts to confront Anita Isaacs at the preliminary hearing is indicia of reliability which, standing alone, afforded the trier of fact with the basis it needed to evaluate the truth of her statement.

It is true that in *Barber*, this court spoke in an antagonistic manner to such a proposal,[77] citing the "ordinarily much less searching exploration of the case (at a preliminary hearing) than at trial."[78] The Ohio Supreme Court seized upon this *dictum* as it reached its decision.

Yet the comment in *Barber* is, itself, not consistent with the *dicta* in the other confrontation cases. *Reynolds*[79] and *Mattox*[80] were, of course, cases where the recorded

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75. The "unavailability" predicate, as has been discussed in Section III, *supra*, was well established in this case.

76. *Dutton*, 400 U.S. at 88-89.

77. At 390 U.S. 725-726.

78. *Id.*

79. 98 U.S. 145 (1879).

80. 156 U.S. 237 (1895).

testimony was taken at a *trial.* Yet *Motes*[81] involved approval of testimony taken at a preliminary hearing, as did *West.*[82] In *Pointer v. Texas,*[83] preliminary hearing testimony was rejected, but with the proviso:[84]

> The case before us would be quite a different one had (the witness') statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given complete and adequate opportunity to cross-examine.

Barber, of course, included language antagonistic to the proposition advanced here. Still, this court was careful to note:[85]

> ". . . there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable. . ."

In *Green,* of course, this Court set forth the indicia in Green's preliminary hearing which would permit the recorded testimony to be used at trial:[86] The circumstances of the preliminary hearing closely approximated those at trial. The witness was under oath. The defendant was represented by counsel who had *every* opportunity to cross-examine. Finally, the proceedings were before a tribunal equipped to provide a judicial record of the testimony.

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81. 178 U.S. 458 (1900).
82. 194 U.S. 258 (1904).
83. 380 U.S. 400 (1965).
84. At 280 U.S. 407, 408.
85. At 390 U.S. 725-726.
86. At 399 U.S. 165.

All of these indicia are present in the case herein.

Of course, the factors mentioned above do not become indicia of reliability by simply mentioning them. They are indicia because they do, in themselves, offer the trier of fact the basis for evaluating the truth of what is presented.

The judicial record insures that the words presented are precisely those used at the prior hearing. The presence of counsel insures that an advocate will be present to raise evidentiary objections—themselves designed to ensure reliability—and, if warranted, inquire of the witness as to discrepancies in testimony or factors regarding credibility.

The judicial setting impresses the witness with the importance of the proceeding and the oath cements that impression into the witness' mind. Finally, the opportunity to cross-examine—the "great engine of truth"—exists, not only to sift the facts from the falsity, but also to provide the witness with no incentive to testify falsely in the first instance.

The latter factor was ignored by the Ohio Supreme Court in its decision herein. An extensive and vigorous cross-examination of a witness, if conducted skillfully, may indeed expose contradictions and weaknesses in the witness' testimony, thereby giving the trier of fact a basis for determining the truth of the statement.

But the benefits of cross-examination guaranteed to a criminal defendant by the confrontation clause do not evaporate if no cross-examination actually occurs.

The prosecution witness does not know, during direct examination, whether he will be cross-examined. He does know, however, that the defense counsel has the opportunity and likely will attempt to attack his story

and his credibility. Thus, the witness will have every incentive to avoid the embarrassment (and possible criminal charge for perjury) which would be the result of discovery of false testimony during a probing cross-examination.

Thus, the mere availability of cross-examination provides much of the protection afforded by the *actuality* of its use. It is this factor which provides the indicia of reliability so frequently recognized in the cases discussed *infra*.

Indeed, the indicia of reliability within a statement taken at a judicial hearing where the witness must face the accused are stronger than the indicia in a dying declaration, where, as noted in *Mattox*,[87] the statements are not made in the presence of the accused, are not subject to cross-examination, and are not made in court so that the witness' demeanor may be observed by the jury. Yet, dying declarations have been admissible for centuries even where they form the basis for a homicide case against the accused. If dying declarations do not offend the confrontation clause, then certainly testimony taken at a judicial hearing where the accused has had the opportunity to confront and cross-examine the witness, should be acceptable also.

As noted in *Mattox*:[88]

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination. Thus, the law says, he shall under no circumstances be deprived of . . ."

87. At 156 U.S. 243-244.

88. *Id.*

We now turn to the objections to the proposition advanced here.

The first was stated succinctly by the Court of Appeals for Lake County:[89] "This right of confrontation of the absent witness, as a witness against him, did not occur at trial."

That premise—that *the right of confrontation is basically a trial right*—is not incorrect. Indeed, in *Barber*, the premise was stated in precisely those words.[90]

But it cannot be disputed at this juncture that the rule quoted from *Barber* is not absolute. As stated in *Barber* and echoed in all the other confrontation cases discussed herein, the rule is that the confrontation clause is a *preferential* rule which requires the State to produce its witnesses in person when available. Where the witness is unavailable, the cases have taught us, the confrontation clause requires that testimony against the accused be accepted in other forms only if the State has made a good faith effort to secure the presence of the witness, and if the testimony bears indicia of reliability.[91]

89. App. at 3.

90. At 390 U.S. 125.

91. Professor Peter Westen argues that the confrontation clause mandates only that the State produce the witness in person, if available. He suggests the remaining requirements set forth in the cases—good faith effort and indicia of reliability—are imposed not by the confrontation clause, but by the due process clause. See Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARVARD LAW REVIEW, No. 3, 561 at 599-601 (January, 1978).

Acceptance of Professor Westen's well-reasoned argument by this court would give new significance to *West v. Louisiana*, 194 U.S. 258 (1904), wherein it was held that due process is not denied by the rule set forth at 13, *supra*, and proposed here as applicable to the confrontation clause as well. Indeed, if Professor Westen is correct, then *West* would be dispositive of the question presented here, as the analysis in Section III, *supra*, establishes compliance with the confrontation clause in this case, and the State has met the demands of the due process clause as established in *West*.

This much, at least, cannot be disputed at this juncture: The right of confrontation, although *basically* a trial right, is not *absolutely* a trial right. Where the necessities of a case demand, the opportunity to confront at a prior judicial hearing of the same cause has been held to afford a criminal defendant the essentials of his right to confront the witnesses against him. Thus, the confrontation clause was not offended in this case merely because the confrontation did not occur at trial.

The second objection to the proposition advanced here is that although it is a judicial hearing, a preliminary hearing is of a type different than a trial, with different levels of proof. Opportunity for confrontation at this level, the objection continues, cannot be said to afford confrontation for purposes at trial.[92]

At this juncture, it may be helpful to examine the nature of preliminary hearing in Ohio.[93]

The preliminary hearing in Ohio is a "full-fledged" judicial hearing[94] under which the circumstances closely approximate those surrounding a typical trial.[95]

As required by Ohio Crim. R. 5(B)(2):

> (2) At the preliminary hearing the prosecuting attorney may, but is not required to, state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state. *The defendant and the judge have full right of cross-*

92. See *Barber v. Page* 390 U.S. 719 at 725-726; Opinion of the Ohio Supreme Court, Petition at 20-21.

93. Criminal procedure in Ohio is governed by the Ohio Rules of Criminal Procedure, promulgated by the Supreme Court and subject to veto by the legislature via a concurrent resolution of disapproval. See Article IV, Section 5 (B), Ohio Constitution.

94. See *Pointer*, at 380 U.S. 407-408.

95. See *Green*, at 399 U.S. 165.

> *examination, and the defendant has the right of inspection of exhibits prior to their introduction. The hearing shall be conducted under the rules of evidence prevailing in criminal trials generally.* (Emphasis added)

At the conclusion of the state's case, a defendant may move for discharge for failure of proof and may offer evidence on his own behalf.[96]

Upon conclusion of all the evidence and statement, if any, of the accused, the examining judge may find probable cause to believe the crime alleged or another felony has been committed, that the defendant committed it, and bind the defendant over to the Court of Common Pleas for action by the Grand Jury; find probable cause to believe a misdemeanor has been committed and that the defendant committed it, then hold the defendant for trial at the lower court level; or discharge the defendant.[97]

But the Criminal Rule makes clear:[98]

> Any finding requiring the accused to stand trial on any charge shall be based solely on the presence of *substantial credible* evidence thereof. . . . (Emphasis added)

The accused has the *right to be present* at the preliminary hearing[99] as well as all subsequent proceedings

96. Ohio Crim. R. 5(B)(3).

97. Ohio Crim. R. 5(B)(4).

98. Ohio Crim. R. 5(B)(5).

99. This requirement is implied from the language of Ohio Crim. R. 5(B)(3), which reads, in part, "defendant . . . may offer evidence on his own behalf," and Crim. R. 5(B)(2), which reads in part, "The defendant and judge have full right of cross-examination and the defendant has the right of inspection of exhibits prior to their introduction."

against him.[100] He has the *absolute right to counsel*[101] unless waived[102] when charged with a serious offense, which would include any felony. He also has the right to *compulsory attendance of witnesses* in his favor via subpoena of the court.[103]

It is obvious from the above that a preliminary hearing in Ohio not only meets the commands of the Fourth Amendment as set forth in *Gerstein v. Pugh*[104] but goes further to provide:[105]

> ". . . a full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing . . ."

And as this court noted, in such hearings:[106]

> The standard of proof required of the prosecution is usually referred to as "probable cause", but in some jurisdictions it may approach a prima facie case of guilt . . . When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination."

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100. Ohio Crim. R. 43.

101. Ohio Crim. R. 44(A).

102. Ohio Crim. R. 44(C).

103. Ohio Crim. R. 17(F). Subdivision (B) of Crim. R. 17 provides that where the accused is financially unable to pay the fees generally required for issuance and service of any subpoena, such subpoenas will be issued without payment. Subdivision (G) of the said rule provides that any failure to obey the commands of a subpoena may be deemed contempt of court.

104. 420 U.S. 103 (1975).

105. *Gerstein*, 420 U.S. at 119-120.

106. *Id.*

Thus, it cannot be disputed that the preliminary hearing afforded Roberts in this case was a "full-fledged" hearing, "closely approximating . . . an actual trial."[107] Under these circumstances, the *dicta* from *Pointer*[108] and *Green*,[109] as well as that from the early case provide a basis for this court to hold that the opportunity to cross-examine Anita Isaacs at the preliminary hearing afforded Roberts his right of confrontation.

In the third objection, closely related to the different-type-hearing objection, discussed above, it is claimed "the difference in the ultimate object of proof makes a great difference in the defense attorney's strategy."[110] It has even been suggested that "The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client."[111]

Both comments ignore the real purpose of the preliminary hearing: To afford the accused protection against possibly lengthy pretrial restraints on his freedom when the case against him is groundless.[112]

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107. Compare the hearings afforded in *Davis v. Alaska*, 415 U.S. 308 (1974), and *Smith v. Illinois*, 390 U.S. 129 (1968), where partial proscription of cross-examination existed, thus denying the right to confront. Compare also *Pointer*, where the accused had no counsel and no opportunity to cross-examine.

108. At 380 U.S. 407-408.

109. At 399 U.S. 165.

110. Opinion of the Ohio Supreme Court, Petition, at 21.

111. This suggestion was made by Roberts' attorney during argument regarding the admissibility of the transcript. See App., at 13. But as the trial judge correctly noted, at App. 14, a preliminary hearing is not a "fishing expedition." Indeed, Ohio provides, in its Crim. R. 16, for extensive discovery of the prosecution's case by the accused prior to trial.

112. See *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975).

The factors which are mentioned by the Ohio Supreme Court[113] as having a practical effect on strategy, however, cannot be completely ignored. Indeed, these factors weighed heavily on the Sixth Circuit Court of Appeals when it decided *Havey v. Kropp,*[114] a case which is, in all material respects, identical to the case herein. The court discussed extensively[115] the strategy factors, and concluded that, absent more, these factors might well lead to a conclusion that the opportunity to confront at a preliminary hearing was not sufficient when the testimony was used at trial.

But the Sixth Circuit found counsel was not working with merely those factors. It noted a Michigan statute which was identical in operation as the statute involved herein.[116] The existence of the statute was crucial.[117]

> On the basis of such factors, were it not for existence of an applicable Michigan statute, it might be difficult to conclude that appellant had not been denied the right of confrontation. In the present circumstance, however, neither was the defendant nor are we now considering the issue in the absence of an applicable statutory provision. . .
>
> This statute was in effect at the time of the preliminary hearing and, therefore, when appellant by his counsel decided to conduct only what he considered to be a limited cross-examination, he did so at his own risk. The opportunity for unlimited cross-examination existed, and since he was chargeable

113. See Opinion, Petition at 21.

114. 458 F.2d 1054 (6th Cir., 1972).

115. At 458 F.2d 1056.

116. Compare Section 2945.49 with 458 F.2d 1056.

117. At 458 F.2d 1056-1057. Footnote omitted.

> with knowledge of the statute and his rights under it, he cannot now be heard to complain because by his own choice he did not fully cross-examine. (Emphasis added)

This logic is inescapable: while certain factors may militate against extensive cross-examination at a preliminary hearing, counsel has notice of the statute. He knows the testimony given at such a hearing may be used later at trial. If he chooses not to cross-examine or to do so perfunctorily, he does so at his client's risk.

This logic, of course, presumes that, as the dissent in the Ohio Supreme Court noted, "(t)he manner of use of (a) trial tactic does not create a constitutional right."[118] This Court has made that presumption clear on more than one occasion.[119]

The Ohio Supreme Court merely stated, without going further,[120] that Anita Isaacs was not cross-examined at the preliminary hearing. Yet the court made no mention of either the extensive examination of Miss Isaacs nor the *opportunity* counsel had of proceeding to cross-examine.

Roberts' attorney obviously had discussed the matter with his client prior to the preliminary hearing[121] and

118. Opinion of the Ohio Supreme Court, Celebrezze, J. dissenting, Petition, at 26, quoting *United States v. Allen,* 409 F.2d 611 (10th Cir., 1969).

119. *E.g., Wainwright v. Sykes,* 433 U.S. 72 at 91, note 14, quoting *Henry v. Mississippi,* 379 U.S. at 451 and *Estelle v. Williams,* 425 U.S. 501 at 512 (1976).

120. Petition, at 22.

121. See, *e.g.,* App., at 21, where counsel inquired as to whether Miss Isaacs and Roberts had ever discussed purchase of a television set, and App., at 17, where Miss Isaacs was questioned as to the dates when Roberts borrowed use of her apartment.

called Miss Isaacs in his defense. He was then surprised by her testimony which incriminated his client.

Counsel had every opportunity at that point to ask the court to declare her a hostile witness and proceed to cross-examine.[122] Counsel did not ask the court to exercise its discretion in that regard, a failure which cannot be imputed to the state.[123]

Thus, Roberts cannot complain of any state action which denied him access to Anita Isaacs or of the opportunity to confront her. He can only complain of his counsel's tactics at the hearing, tactics used with full knowledge that the statute could preserve the testimony for trial.

In summary, then, Roberts cannot complain that the confrontation clause demands absolute observance, because this court has made it clear that the clause is a *preferential* rule. He cannot complain that his preliminary hearing was of a kind totally different than that of a trial, because the hearing is founded in rules which demand it be of a full-blown adversarial nature. And he cannot complain that factors of strategy and tactics denied him the right to fully confront, because his counsel knew the testimony could be preserved for trial.

In short, Herschel Roberts had every *opportunity* to fully examine and cross-examine Anita Isaacs, an oppor-

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122. In Ohio, no "voucher rule" exists, but before counsel may cross-examine his own witness, he must show some grounds therefor. Whether a witness is then declared hostile is within the sound discretion of the trial court. *State v. Parrott*, 27 Ohio St. 2d 205, 272 N.E.2d 112 (1971); *State v. Minneker*, 27 Ohio St. 2d 155, 271 N.E.2d 821 (1971).

123. As this Court noted in *Barber*, at 390 U.S. 724, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff."

tunity which, under these facts, must be held to have satisfied the demands of the confrontation clause.[124]

B. The totality of circumstances under which Anita Isaacs' testimony was taken at the preliminary hearing afforded the jury at Roberts' trial a satisfactory basis for evaluating the truth of her testimony.

It has been well established in previous arguments that the preliminary hearing afforded Herschel Roberts herein was a "full-fledged" judicial hearing of an adversary nature, in which he was present and had every opportunity to cross-examine extensively. Based on the early cases, such would be enough to establish the indicia of reliability necessary for admission of that testimony at trial. And it has been argued that the opportunity to cross-examine at the preliminary hearing met the demands of the confrontation clause.

It has been suggested, however, that the Ohio Supreme Court was not entirely accurate when it concluded that Anita Isaacs was not cross-examined. We now turn to that aspect of the case.

Notable in the testimony[125] is the *absolute absence* of any objection whatever by the prosecutor to any question posed to Miss Isaacs.

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124. Any other rule would lead to the practical result that defense counsel would have every incentive *not* to cross-examine at a preliminary hearing, then hope the witness would not appear at trial. And such a situation would provide criminal defendants with every incentive to make sure witnesses against them would not be available for trial.

125. App. at 16-23.

Also notable in the testimony is that *absolute absence* of any admonition from the bench as to the manner or content of the questions posed.

Roberts' attorney was thus wholly unimpeded in his questioning of Miss Isaacs. As noted earlier,[126] he had obviously discussed the matter in some detail with his client and was prepared to ask her questions regarding his client's purported relationship with her. When he found her account conflicted with his client's, he did not cease his examination but rather continued extensively, and in some detail, to probe what she knew and was prepared to say. Through all of this, neither opposing counsel nor the bench sought to limit him.

Further the transcript itself bears indicia of cross-examination. Throughout the examination, and particularly at crucial questions, Roberts' counsel used leading and argumentative questions, the hallmarks of cross-examination.[127] He ceased asking the cross-examination-

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126. See note 21, at 45 *supra*.

127. At App., at 17, it was asked: "I see. *Now is it a fact* that he has been staying at your place for the last couple, three weeks?" (emphasis added)

Later, at App., 17, the question was posed: "O.K. Now, is it to your knowledge then, that this Mr. Roberts has been staying at your apartment until the present time, from December 30th?"

And see App., at 20, where the question is posed: "Now, since December 24th, isn't it a fact that you have been in your parents' home since that time?"

Later on the same page, it is asked: "Now your parents weren't home at that time; isn't that correct?"

And again on App. 20: "You did not observe any broken doors or windows, or anything taken; is that correct?"

On App. 21, the crucial question in Roberts' entire defense was set forth in language which was at once both argumentative and leading: "Now, is it a fact that you have seen these credit cards since the 23rd of December and isn't it a fact also that you gave these cards to Mr. Roberts?"

type questions not because he was instructed to, but rather because he desired to.

The totality of circumstances, then, are those of a full judicial hearing, with the defendant present, represented by counsel who had every opportunity to develop whatever evidence might be allowed by the rules of evidence, and extensive examination if not cross-examination of a clearly adverse witness who testified under oath.

All of these indicia of reliability, taken together, certainly could and did provide the trier of fact with a substantial basis for evaluating the truth of Anita Isaacs' statements, and Roberts was denied no right of confrontation by the use of her transcribed testimony at trial.

CONCLUSION

The Supreme Court of Ohio erred in ruling that, under the facts herein, the recorded preliminary hearing testimony of Anita Isaacs should not have been used at Roberts' trial. The judgment of that court should be reversed.

Respectfully submitted,

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